

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

GTE Telephone Operating Cos.
GTOC Tariff No. 1
GTOC Transmittal No. 1148

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CC Docket No. 98-79

COMMENTS OF
KMC TELECOM, INC.

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SUMMARY

KMC Telecom, Inc. supports the petitions for reconsideration filed by MCI WorldCom, Inc. and the National Association of Regulatory Commissioners of the *DSL Jurisdictional Order* issued by the Commission in this proceeding. Petitions to suspend and investigate filed in this proceeding raised serious questions concerning whether the rates terms and conditions of GTE's DSL tariff offering are just and reasonable under Sections 201-205 of the Communications Act. The Commission in this proceeding has abused its discretion in ignoring these issues and essentially converting this proceeding into a vehicle for making a statement about its authority over locally provisioned services used to connect to the Internet.

In addition, the Commission's determination that more than ten percent of traffic on GTE's DSL service will be jurisdictionally interstate is without any foundation in the current record. The *DSL Jurisdictional Order* relied on sweeping generalizations about the Internet rather than on any factual basis that could support a rational conclusion that more than ten percent of DSL traffic will be interstate. Nor did the Commission state how it believes Internet traffic should be measured, even on an aggregate basis, for purposes of making its ten percent determination. Accordingly, the Commission's ten percent determination in this proceeding is unlawful.

The *DSL Jurisdictional Order* additionally fails to comport with the Commission's long-standing treatment of telecommunications and information services as mutually exclusive regulatory categories. This Commission should clarify that for regulatory purposes under the Act telecommunications ends where information services begins.

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**COMMENTS OF
KMC TELECOM, INC.**

KMC Telecom, Inc. ("KMC") respectfully submits the following comments in support of petitions for reconsideration filed by MCI WorldCom, Inc. ("MCI WorldCom") and the National Association of Regulatory Utility Commissioners ("NARUC") of the *DSL Jurisdictional Order*¹ issued by the Commission in this proceeding.

KMC Telecom, Inc. is authorized to provide, through its subsidiaries, competitive local and long distance services in 18 states, and Puerto Rico, and is operational in eleven states (Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Minnesota, North Carolina, Texas, Virginia, and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Melbourne, Pensacola, Sarasota & Tallahassee, Florida; Savannah and Augusta, Georgia;

¹ *GTE Telephone Operating Cos.*, Memorandum Opinion and Order, CC Docket No. 98-79, FCC 98-292, released October 30, 1998 ("*DSL Jurisdictional Order*"). See Public Notice, DA 98-2502, released December 4, 1998.

Topeka, Kansas; Baton Rouge and Shreveport, Louisiana; Greensboro and Winston-Salem, North Carolina; Corpus Christi, Texas; Roanoke, Virginia; and Madison, Wisconsin, and will soon build similar networks in several other cities in the Southeast and Midwest.

In its petition for reconsideration, MCI WorldCom urges the Commission to reconsider its decision that GTE's DSL service when used to connect end users to an Internet Service Provider ("ISP") in the same state is an interstate use.² It states that this finding is inconsistent with the Commission's findings in the *Report to Congress*³ and other precedent. In its petition, NARUC requests that the Commission clarify that states may require tariffing of DSL services used to connect end-users to the Internet, clarify that cost allocation procedures pertaining to GTE's DSL tariff remain in effect pending Joint Board review, and that the Commission disclaim its rationale in the *DSL Jurisdictional Order* or, at a minimum, determine that it is tentative and strictly limited to the instant proceeding.

KMC supports the position of MCI WorldCom as fully warranting reconsideration. KMC also supports the NARUC petition insofar as it requests that the Commission determine that states can have authority over DSL services used to connect to the Internet and that the Commission rescind or clarify its jurisdictional determinations in the *DSL Jurisdictional Order*. In addition, KMC presents the following positions as warranting reconsideration.

² MCI WorldCom Petition at 2.

³ *Federal State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) ("*Report to Congress*").

**I. THE COMMISSION HAS UNLAWFULLY FAILED TO INVESTIGATE
ISSUES RAISED IN PETITIONS TO SUSPEND AND INVESTIGATE**

Sections 201 and 202 of the Communications Act require that the rates, terms, and conditions of a carrier's proposed interstate tariff be just and reasonable. Under Section 204(a)(1) of the Communications Act the Commission may suspend a tariff for up to five months and initiate an investigation of the lawfulness of the proposed tariff. The Commission must conclude any such an investigation within five months of the date the tariff becomes effective.⁴ This statutory framework envisions that the Commission will evaluate proposed tariffs to determine whether the rates, terms, and conditions proposed by the carrier are just and reasonable under the standards of Sections 201-205 of the Act, suspend and investigate the tariff if a substantial question of lawfulness is raised, and then conclude the investigation within five months.

Numerous petitions to suspend and investigate GTE's tariff were filed in this proceeding raising a number of serious issues. For example, one party conducted a comparison of GTE's prices for unbundled network elements and the proposed prices for GTE's DSL service that shows the DSL prices are substantially below cost.⁵ This raises the issues of whether GTE's rates are cost justified and of what is the appropriate allocation of loop costs between DSL and services (interstate and intrastate) to which those costs are currently allocated. Another party pointed out that the tariff provides GTE an opportunity to discriminate against consumers and

⁴ 47 USC Sec. 204(a)(2)(A).

⁵ Northpoint Petition at 2-3.

ISPs in the provision of the service by restricting the availability of the consumer DSL modems needed to receive the service.⁶

The Common Carrier Bureau's *Designation Order*⁷ and the *DSL Jurisdictional Order* essentially ignored these and other serious issues raised in the record of this proceeding. While the Commission in the *DSL Jurisdictional Order* determined that the price squeeze issue was an insufficient reason to alter its determinations concerning the jurisdictional nature of DSL, it failed to address, or even state why it was not addressing, the serious pricing issues concerning DSL or any of the other substantive issues concerning the lawfulness of GTE's DSL tariff. Instead, the Commission has chosen to convert this proceeding into its vehicle for making a statement about its authority over locally provided advanced services used to connect to the Internet. In doing so, the Commission has ignored its responsibilities under Sections 201-205 of the Act to assure that the rates terms and conditions of carriers' offerings are just, reasonable, and non-discriminatory.

KMC submits that the Commission's narrowing of this tariff investigation to a jurisdictional issue and its failure even to state why investigation is not warranted of the serious pricing and other issues concerning whether GTE's DSL tariff is just and reasonable, much less fully address those issues, constitutes an abuse of discretion. The Commission should seek to remedy this situation by promptly initiating an investigation under Section 205 of the Act of these issues raised, but so far ignored, in this proceeding.

⁶ MCI Petition at 7.

⁷ GTE Telephone Operating Cos., Order Designating Issues for Investigation, CC Docket No. 8-79, DA 98-1667, released August 20, 1998 (*"Designation Order"*).

In this connection, KMC questions the extent of the Commission's discretion post-1996 Act to suspend and investigate in tariff investigations. At least previous to the tariff streamlining provisions of the 1996 Act taking effect, the Commission has taken the view that it has non-judicially reviewable discretion concerning whether to suspend and investigate tariffs.⁸ The theory has been that since parties can file a complaint under Section 208 and collect damages for the entire time the tariff has been in effect parties were not prejudiced by a decision not to suspend and investigate. However, in its rulemaking implementing the tariff streamlining provisions of the 1996 Act the Commission determined that LEC tariffs are "deemed lawful" unless suspended and investigated prior to becoming effective and that carriers are not liable for damages under a tariff that becomes effective without suspension and investigation.⁹ Relief with respect to such tariffs is limited to changing the tariff on a going-forward basis pursuant to a finding of unlawfulness by the Commission in a complaint proceeding or separate investigation under Section 205. Thus, the tariff streamlining provisions of the 1996 Act removed the legal underpinnings to the Commission's previous view of its discretion to conduct and order tariff investigations.

⁸ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, 11 FCC Rcd 12406, 12428 (1996).

⁹ *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-187, FCC 97-23, released January 31, 1997, para. 19.

II. THE COMMISSION'S APPLICATION OF THE "TEN PERCENT RULE" IS UNLAWFUL

KMC has carefully examined the record in this proceeding for factual information that would support the Commission's conclusion that more than ten percent of traffic over GTE's DSL service is, or will be, jurisdictionally interstate under the Commission's end-to-end jurisdictional analysis. Such information would consist of some facts and an analysis showing a basis for a finding that 10 percent or more of DSL traffic would involve connection to an out-of-state site. KMC was unable to find any such information that could form the basis for a rational conclusion that more than 10 percent of traffic measured in some appropriate way would involve users of DSL being connected to an out-of-state site. The Commission itself in the *DSL Jurisdictional Order* cited no such information, relying instead on sweeping generalizations about the world-wide nature of the Internet. In essence, the Commission merely assumed that more than 10 percent of DSL traffic would be jurisdictionally interstate rather than present any foundation for its ten percent conclusion. KMC submits that on reconsideration the Commission must provide a more solid foundation for its determination that more than 10 percent of DSL traffic is jurisdictionally interstate.

In fact, it is probable, or at least possible, that only a small percentage of usage of DSL to connect users to the Internet would be jurisdictionally interstate under the jurisdictional end-to-end analysis of the *DSL Jurisdictional Order* because of "caching" and "mirroring" of web sites on local servers. Thus, most ISPs cache on their local servers the web sites contacted most frequently by their customers which are then regularly updated, sometimes daily or even hourly, on an "offline" basis independent of any particular call. This means that in most cases the user

is not connected to a distant server but to a local one. ISPs cache and mirror distant sites because it economizes on use of telecommunications services and provides a faster level of service to end users without significantly diminishing the currency or accuracy of web site information accessed. Moreover, web browsing is only one possible use of DSL service to connect to the Internet.

KMC submits that the Commission's statement that "the communications at issue here do not terminate at the ISP's local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destination, very often at a distant Internet website accessed by the end user"¹⁰ may be factually erroneous in most cases. However, the Commission failed to acknowledge or understand this technological reality in the *DSL Jurisdictional Order*. It is possible that in earlier years when information services were just beginning there was little or no caching. However, the Internet and information services have evolved considerably since then and are being provisioned in the most efficient, economical manner, including by local caching of distant sites. KMC submits that the Commission on reconsideration must consider the real world way in which Internet services are provided.

Nor does the *DSL Jurisdictional Order* makes any effort to analyze or determine to what extent DSL will be used to connect to the Internet and used for e-mail or other services which have significant intrastate uses, or attempt to determine the extent to which DSL service is jurisdictionally interstate when viewed from the perspective of total usage to connect to the Internet. From all that appears on the record, it is equally possible to conclude that less than

¹⁰ *Jurisdictional DSL Order*, para. 19.

ten percent of usage of DSL will be jurisdictionally interstate under the Commission's end-to-end jurisdictional analysis, rather than the other way around.

Moreover, the Commission has not articulated how Internet traffic would be measured for purposes of application of the "ten percent rule." Since the Commission found that more than ten percent of DSL traffic is interstate, presumably it would have at least a theoretical understanding of how measurement of such traffic would take place. For example, is the amount of interstate traffic measured by the amount of bytes transmitted to interstate sites? Or, would it be the duration of time in which bytes are actually being transmitted to a distant site? KMC submits that the Commission's failure to show how such traffic would be measured renders its determination that more than ten percent of traffic is interstate completely unfounded. For the Commission to make a rational determination that ten percent of DSL traffic is interstate it would need to determine how the ten percent rule, which was developed for application to the circuit switched network, should be applied to DSL and packet switched networks, and then apply that standard in this proceeding. In this connection, even if it is true that "it may not be possible to ascertain the destination of any particular transmission,"¹¹ the Commission's determination cannot be rationally based absent some understanding of how Internet traffic should be jurisdictionally measured at least on some aggregate or estimated level. Interested parties must be given some basis on which to attempt to determine whether ten percent of the traffic is interstate. On the present record, however, parties are left completely in the dark on how the ten percent test could be applied to Internet traffic and the Commission's basis for applying that test in this case.

¹¹ *DSL Jurisdictional Order*, para 26.

In essence, the Commission's assertion of federal jurisdiction in this proceeding is based on no more than sweeping, unsupported cliches about the Internet. KMC submits that the Commission has assumed that 10 percent of DSL calls to the Internet are interstate without knowing how much Internet traffic could be genuinely considered interstate. The Commission's application of the ten percent rule in this case is therefore arbitrary and capricious and unlawful. This is particularly true in light of the momentous regulatory consequences involved in this proceeding. In effect, the *DSL Jurisdictional Order* establishes a foundation for asserting exclusive federal jurisdiction over all advanced services provided by LECs when used to access the Internet - the network of the future - ousting states of any say in the matter. The Commission has an obligation to attempt to achieve this highly significant result on a more reasoned and factual basis than the unsupported assumptions and banalities about the Internet provided in the *DSL Jurisdictional Order*.

III. THE COMMISSION'S JURISDICTIONAL ANALYSIS DOES NOT COMPORT WITH THE COMMISSION'S STATUTORY ANALYSIS IN THE *REPORT TO CONGRESS* AND LONG-STANDING COMMISSION PRECEDENT

In the *DSL Jurisdictional Order*, the Commission stated that “it has never found that “telecommunications” ends where “enhanced” information services begins.”¹² KMC submits that this statement is erroneous. In the *Report to Congress*, the Commission extensively addressed the meaning of “telecommunications” and “information service” as defined in the 1996 Act and concluded that Congress established them as mutually exclusive regulatory categories.¹³ Therefore, in fact, the Commission has found that under the 1996 Act telecommunications ends where the information service begins. To determine otherwise would contradict the Commission’s own determination that these are mutually exclusive regulatory categories.

In fact, the determination in the *Report to Congress* that information services and telecommunications are mutually exclusive is merely a restatement of the Commission’s longstanding regulatory treatment of information services (formerly “enhanced services”) under which an information service will be considered for regulatory purposes to be exclusively an information service even though it may use telecommunications or be comprised of telecommunications components. Thus, under the Commission’s own “contamination doctrine,” once a service has any information service components it becomes exclusively an information

¹² *DSL Jurisdictional Order*, para. 20.

¹³ *Id.* para. 39.

service.¹⁴ The Commission effectively applied this doctrine in the *Report to Congress* when it determined that the telecommunications components of Internet access services do not under the Act have any “legal status” separate from that of the information service.¹⁵

Thus, the Commission has considered what regulatory consequences should attach to the fact that information services can use telecommunications, or, in the words of the 1996 Act are provided “via telecommunications,” and has determined that for regulatory purposes information services and telecommunications are mutually exclusive regulatory categories notwithstanding that information services are provided via telecommunications. Therefore, for regulatory purposes, telecommunications ends where the information service begins.

The *DSL Jurisdictional Order* noted that in one of its ONA orders the Commission stated that “an otherwise interstate basic service ... does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II.”¹⁶ KMC is concerned that the Commission may be interpreting this as a finding that telecommunications for regulatory purposes continues past the information service. In the cited ONA order, the Commission was addressing and rejecting BOC arguments that their provision of telecommunications services to information service providers should be deregulated

¹⁴ As stated by the Commission: “[u]nder the ‘contamination theory’ developed in the course of the *Computer II* regulatory regime, [value added networks] that offer enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers. The enhanced component of their offerings ‘contaminates’ the basic component, and the entire offering is therefore considered to be enhanced.” *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1153, n. 23.

¹⁵ *Report to Congress*, para. 79.

¹⁶ *DSL Jurisdictional Order*, para. 20 citing *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 141, n. 617 (1988).

because information services are not regulated.¹⁷ The Commission's statement merely affirmed that BOCs could not escape regulation merely by providing service to information service providers. As such, it does not amount to a policy or determination that information services are not separate, mutually exclusive regulatory categories under the Act. The statement cited by the Commission is consistent with the treatment of information services and telecommunications as separate mutually exclusive categories because regulation of the BOCs' provision of basic services does not necessitate regulation of an information service even though it may use, or consist in part of, an offering of telecommunications. Thus, the ONA order cited by the Commission does not provide any basis for concluding that for regulatory purposes telecommunications extends past the information service. KMC also points out that the Commission in the *DSL Jurisdictional Order* was highly selective in what it chose to quote from the cited ONA order. In fact, in the text of that order, instead of a footnote, the Commission stated that the addition of enhanced service elements to a basic service "neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations..'(emphasis added).¹⁸ Thus, the Commission was only stating the obvious point that the basic nature of the separate regulated carrier's offering does not change or become unregulated just because an information service provider subsequently adds enhanced service elements to it. The Commission left in place its long standing view that the service offered by the information service will be considered exclusively an information service.

¹⁷ *Id.*

¹⁸ 4 FCC Rcd 1, 141, para. 274.

To the extent the *DSL Jurisdictional Order* seeks to attach a separate legal status to the telecommunications component of an information service offering based on ONA orders, or on any other basis, this flatly contradicts the Commission's interpretation of the Act in the *Report to Congress*, which directly addressed this issue, as well as the Commission's long standing policy, and is, therefore, unlawful. KMC notes that the Commission has effectuated its determination that information services and telecommunications are mutually exclusive regulatory categories under the Act by, for example, determining in the *Universal Service Order*¹⁹ and in the *Report to Congress*²⁰ that information service providers would not be required to contribute to universal service funding even though information services can be comprised in part of telecommunications components.

Assuming the Commission does not rescind its assertion of jurisdiction over GTE's DSL service, KMC submits that the Commission on reconsideration must establish a basis for its jurisdiction that is consistent with its prior statutory analysis concerning the regulatory treatment of telecommunications and information services. The Commission should revise its analysis to make clear that it is not necessary for its assertion of jurisdiction over GTE's DSL service to determine that the telecommunications continues past the ISP. The Commission should determine that under the statutory scheme there is an overarching subject matter subject to the Commission's jurisdiction under Title I - interstate communications by wire - that encompasses

¹⁹ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 12 FCC Rcd 8776, 9180 (1997) ("*Universal Service Order*").

²⁰ *Report to Congress*, paras 123-130.

both telecommunications and information services.²¹ Thus, if the Commission does not rescind its jurisdictional determination completely, it should determine that it possesses jurisdiction over the entirety of a DSL call to a distant Internet site because it constitutes an interstate communication by wire. It should additionally determine that this interstate communication by wire is comprised of separate mutually exclusive information service and telecommunications segments, the telecommunications component of which terminates at the ISP. This approach would be consistent with the Commission's own determinations as discussed above concerning the regulatory mutual exclusivity of information and telecommunications under the Act.

If the Commission rejects the foregoing analysis and essentially affirms its prior order it should make clear that any determination that telecommunications extends past the information service is only for purposes of its jurisdictional analysis and that for regulatory purposes under the Act information services and telecommunications services are mutually exclusive regulatory categories. The Commission should state that for regulatory purposes under the Act the telecommunications ends where the information service begins notwithstanding that they may be jurisdictionally interstate.

²¹ See 47 U.S.C. Secs. 153(22) and (53).

CONCLUSION

For these reasons, KMC requests that the Commission on reconsideration rescind or revise the *DSL Jurisdictional Order* consistent with the views presented herein.

Respectfully submitted,



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Dated: January 5, 1999

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January 1999, copies of the foregoing Comments of KMC Telecommunications, Inc. Communications Corporation were served by hand delivery to the parties on the attached service list:

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